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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1261

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

HILDA ABRAMS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL M. FRIEDMAN,
Acting Solicitor General,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Housing and Urban Development and the other federal defendants, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-22a) is not yet reported. The opinion of the district court (App. C, *infra*, pp. 24a-29a) is reported at 415 F. Supp. 550.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 23a) was entered on December 1, 1976. On February 22, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 12 U.S.C. (Supp. V) 1715z-1(f)(3) required the Secretary of Housing and Urban Development to establish an operating subsidy program.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to this petition (App. D, *infra*, pp. 30a-35a).

STATEMENT

1. Section 236 of the National Housing Act, as added, 82 Stat. 498, and amended, 12 U.S.C. (1970 ed. and Supp. V) 1715z-1, is designed to encourage private enterprise to develop rental and cooperative housing for lower income families. To this end, the statute provides for three programs—the "interest reduction" (12 U.S.C. 1715z-1(a)), "deep subsidy" (12 U.S.C. (Supp. V) 1715z-1(f)(2)), and "operating subsidy" (12 U.S.C. (Supp. V) 1715z-1

(f)(3)) programs.[1] The operating subsidy program would provide for periodic payments, on behalf of tenants who pay more than 25 percent of their income in rent, to the owner of a qualifying housing project to offset increases in utility charges and local property taxes. The effect of such payments would be to reduce the amount by which the tenants' rentals would otherwise have to be increased on account of such increased costs.

Like all other programs established under Section 236, the operating subsidy program would require the use of "contract authority". See *Train* v. *City of New York*, 420 U.S. 35, 39 n. 2. Congress first specifies the total dollar amount of contracts that may be undertaken for a given program ("authorized contract authority") and, by subsequent appropriation statutes, permits the Secretary to use specified amounts of that authorized contract authority ("released contract authority") for a given fiscal year or other specified period of time. From time to time thereafter, Congress appropriates the funds necessary to satisfy contractual obligations entered into pursuant to released contract authority ("the liquidation funds").[2] Congress has not ap-

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[1] The "interest-reduction" program provides assistance in paying the interest on a project mortgage, and the "deep subsidy" program permits very low income tenants to occupy units in a project by defraying their rental expense to the extent that it exceeds 25 percent of income.

[2] Appropriated funds are supplemented by a special revolving fund ("the reserve fund"), consisting of payments from project owners to the Secretary of amounts collected

propriated released contract authority for the Section 236 programs since 1972 (Pub. L. 92-383, 86 Stat. 540).

The released contract authority at the beginning of fiscal year 1976 was approximately $125 million.[3] It was estimated that operation of the deep subsidy program, which the Secretary was required to establish (12 U.S.C. (Supp. V) 1715z-1(f)(2)), would require the obligation of $50 million in that year alone. It was further estimated that the Secretary's commitments under the interest reduction program would require $74.8 million,[4] and that implementation of the operating subsidy program would cost an additional $53.7 million for that fiscal year. Thus the released contract authority was insufficient to cover both the outstanding commitments

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in excess of "basic rental charges." See 12 U.S.C. (Supp. V) 1715z-1(g). Prior to August 1976, this fund could be used only for payment of operating subsidies; now it may be used for other housing programs as well. Pub. L. 94-378, 90 Stat. 1095, 1096. We are informed by the Secretary that as of December 31, 1976, the reserve fund contained approximately $54.4 million.

[3] The account given here of the Section 236 programs and related matters is set forth with supporting affidavits in the Secretary's application to this Court for a stay pending appeal in *Hills* v. *Underwood*, C.A. D.C., Nos. 76-1603 and 76-1650, which was granted on October 18, 1976. A copy of that stay application is being furnished to counsel for respondents.

[4] Although the interest reduction program was suspended in January 1973, outstanding commitments made prior to that suspension were estimated to require utilization of $74.8 million in contract authority for fiscal year 1976 alone.

under the interest reduction program and implementation of the operating subsidy program. The Secretary decided to honor the outstanding commitments and not to establish the operating subsidy program.

2. Respondents are tenants of the Meyler Park Apartments, a housing project in San Pedro, California, that receives interest-reduction assistance pursuant to Section 236. They commenced this suit in the United States District Court for the Central District of California, asking that the Secretary be ordered to establish and implement an operating subsidy program for the project and requesting payments of the subsidy retroactive to February 18, 1975 (the date on which they contended the program should have been instituted).[5] The district court certified a class comprised of all eligible Meyler Park tenants. The court held that establishment of an operating subsidy program was mandatory under Section 236, and it ordered the Secretary to establish and implement such a program for Meyler Park. The court

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[5] The statute fixes no date for the commencement of payments; it does provide that an initial operating expense level "shall be established" by February 18, 1975, for any project receiving interest-reduction assistance. 12 U.S.C. (Supp. V) 1715z-1(g). The initial operating expense level is defined as the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. 12 U.S.C. (Supp. V) 1715z-1(f)(3). The amount of interest-reduction assistance cannot exceed the amount by which, at the time of the most recently approved rent increase, utility charges and property taxes exceeded the project's initial operating expense level.

also ordered the Secretary to pay respondents benefits, equal to the amount their rentals would have been reduced on account of payment of the subsidy to the project owner, retroactive to February 18, 1975.

The court of appeals affirmed the award of retroactive benefits.[6] The court held that the Secretary abused her discretion in not establishing an operating subsidy program. The court reasoned that the Secretary could have made operating subsidy payments, in excess of the amount of released contract authority, from a special reserve fund (see note 2, *supra*) and therefore could have established and implemented all three Section 236 programs.[7]

REASONS FOR GRANTING THE PETITION

The case involves an important question of national housing policy that this Court should resolve. The same issue is raised in the government's peti-

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[6] As of July 1, 1976, respondents began receiving assistance under the so-called "Section 8 set-aside program" established pursuant to 42 U.S.C. (Supp. V) 1437f. See 24 C.F.R. 886. Under that program, respondents pay no more than 25 percent of their adjusted incomes toward rent. Since the operating subsidy program assists only tenants who pay rent equal to more than 25 percent of their incomes, the court of appeals concluded that respondents' request for prospective relief was moot (App. A, *infra*, p. 10a).

[7] Following the decision, the Secretary made payments for January 1, 1976, through June 30, 1976. Payments for 1975 were being calculated when, on February 10, 1977, the court of appeals recalled its mandate pending disposition of the case on petition for a writ of certiorari.

tion for a writ of certiorari in *Harris* v. *Ross*, No. 76-1234, filed March 4, 1977. For the reasons stated in that petition, a copy of which we are furnishing to counsel for respondent, this case also warrants review.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Acting Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

HARRIET S. SHAPIRO,
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Attorneys.

MARCH 1977.

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[8] ~~See the *Underwood* stay application, p. 10 n. 8, p. 12.~~ This case, unlike *Harris* v. *Ross*, *supra*, involves retroactive payments. Accordingly, it may be appropriate for the Court to grant both petitions in order to hear the two cases together.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2095

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, individually and as representatives of a class, PLAINTIFFS-APPELLEES

vs.

CARLA A. HILLS, as Secretary of the United States Department of Housing and Urban Development, H. R. CRAWFORD, as Assistant Secretary for Housing Management of the United States Department of Housing and Urban Development, ROLAND CANFIELD, as Director of the Los Angeles Area Office of the Department of Housing and Urban Development, and G & K MANAGEMENT, CO., INC., and MEYLER PARK APARTMENTS, a Limited Partnership, DEFENDANTS-APPELLANTS

OPINION

[December 1, 1976]

Appeal from the United States District Court
for the Central District of California

Before: BARNES, ELY, and WRIGHT,
Circuit Judges

ELY, Circuit Judge:

This suit was instituted by residents of a multi-family housing project, Meyler Park, constructed with assistance provided under the National Housing Act, 12 U.S.C. § 1715z-1 (1970) (Supp. IV). The provision of that Act at issue in the present appeal established the "operating subsidy" program, a program that we shall explain. The Secretary of Housing and Urban Development (hereinafter the Secretary) refused to implement the "operating subsidy" program on various grounds, and in September, 1975, the plaintiffs, here the appellees, sued,[1] alleging that the failure of the Secretary to establish an initial operating expense level [2] for Meyler Park and to pay an "operating subsidy" was unlawful.

The District Court held that it had jurisdiction under 28 U.S.C. § 1361, and certified the suit as a class action on behalf of the named plaintiffs and all tenants of Meyler Park who paid "basic rent," as defined in 12 U.S.C. § 1715z-1, in excess of 25% of their adjusted family income. The court then held that the Secretary was required to provide an "op-

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[1] Although Meyler Park Apartments was named as a defendant in the District Court, the enterprise is not a party to this appeal.

[2] The initial operating expense level is defined in 12 U.S.C. § 1715z-(1)(f)(3) (1970) (Supp. IV) as:

> . . . [T]he sum of the costs of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. . . .

erating subsidy" to Meyler Park and ordered the Secretary to: (a) establish an initial operating expense level for Meyler Park; and (b) to pay a subsidy to Meyler Park, retroactive to February 18, 1975, equivalent to the difference between the initial operating expense level and the cost of present reasonable and comparable property taxes and utilities.

The Secretary appeals, contending that the court erred in requiring her to establish an initial operating expense level and to pay an operating subsidy to Meyler Park and that, in any event, the court erred in requiring that such payments be made retroactive to February 18, 1975.

STATUTORY BACKGROUND

The national housing goal, as expressed in the Housing Act of 1949 is "the realization as soon as feasible of . . . a decent home and suitable living environment for every American family." 42 U.S.C. § 1441 (1949). That act provides that the agency of Housing and Urban Development ("HUD") "shall exercise [its] powers, functions and duties under this or any other law, consistently with the national housing policy declared by this act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established . . . ." 42 U.S.C. § 1441.

In furtherance of that goal, and in realization that the national housing objectives were not being achieved, Congress, in 1968, enacted the Section 236

federally-subsidized housing program, 12 U.S.C. § 1715z-1, which was designed "to assist families with incomes so low that they could not otherwise decently house themselves." In particular, the Section 236 program was enacted "[f]or the purpose of reducing rentals for lower income families," 12 U.S.C. § 1715z-1(a), by providing for federal mortgage insurance and interest reduction payments to project owners so that rental rates to the tenants could be lowered accordingly. By this means, Section 236 encouraged private enterprise to develop low-cost housing, and, in exchange for these benefits, project owners agreed to maintain low rentals for tenants, and to be regulated by HUD with regard to leases, rent raises, and other operational activities.

As the program was initially designed, tenants in Section 236 housing projects would pay the greater of twenty-five percent (25%) of their adjusted income (as defined in 24 C.F.R. § 236.2) or "basic rent" calculated on the basis of operating the project under a mortgage bearing interest at one percent per annum.[3] 12 U.S.C. § 1715z-1(f)(1)(A). But no tenant would pay more than the "fair market rent," which is computed upon the project's operating cost under the existing mortgage at the commercial interest rate. 12 U.S.C. § 1715z-1(f)(1)(B).

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[3] Basic rents are actually established upon the application of a factor of 3.331 percent to the "replacement cost" of the project. *See Dew* v. *McLendon Garden Associates*, 394 F. Supp. 1223, 1229 (N.D. Ga. 1975).

Consistent with this scheme, direct financial assistance[4] is provided to project owners in the form of periodic interest reduction payments, which is the sum necessary to reduce the effective interest rate to one percent per year. 12 U.S.C. § 1715z-1(c). The interest reduction subsidy payment is made directly to the mortgagee on behalf of the project owner. The benefit of the interest reduction subsidy is passed on to the tenants in reduced rents. 12 U.S.C. § 1715z-1 (f).

Pursuant to the statute, the Secretary is granted broad authority to promulgate regulations,[5] 12 U.S.C. § 1715z-1(e), and to enter into such agreements as she deems necessary or desirable in order to administer the program. 12 U.S.C. § 1715z-1(h). Pursuant to this latter authority, the Secretary's agreement with the mortgagor in this case provides that no change will be made in the basic rental or fair market rental unless approved by HUD. If the owner wishes to increase the rental charge above the maximum permitted by HUD, as a result of increases in taxes or maintenance costs, it must submit a written request properly supported by substantiating evidence.

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[4] Project owners receive indirect benefits in the form of favorable tax status [Int. Rev. Code of 1954 §§ 1250(b)(4), 1039; *see* Real Estate and Tax Reform: An Analysis and Evaluation of Real Estate Provisions of Tax Reform Act of 1969, 30 Mich. L. R. 1 (1970)] and other monetary incentives.

[5] The Secretary's regulations are contained in 24 C.F.R. 236.1, *et seq.*

Funds for the Section 236 program are provided by means of "contract authority," a process by which the Secretary enters into a commitment for the payment of federal funds both immediately and in the future, up to a stated limit, prior to an appropriation of funds for the liquidation of such commitments.

The expenditure of funds through the use of "contract authority" involves four steps. First, the basic statute establishing the program authorizes the use of contract authority. Second, the Congress, in a separate appropriation statute, releases this contract authority by authorizing the Secretary to utilize the contract authority up to a specified amount. The Secretary then may enter into contracts to make annual payments for the Section 236 program up to the limit established in the appropriation act. Finally, Congress appropriates a specific amount from the Treasury to make payments to liquidate the contracts which the Secretary has made.

The 1974 Amendments. By means of Section 212 of the Housing and Community Development Act of 1974, P.L. 93-383, 88 Stat. 672, the Congress amended the National Housing Act in several respects. One of these amendments to Section 236 established the so-called "deep subsidy" program. The amendment provided that, as to 20 percent of the dwelling units in any Section 236 project constructed pursuant to a contract entered into after the effective date of the Act, the Secretary "shall make and contract to make" additional assistance payments to the project on behalf of tenants whose incomes are too low to enable

them to afford the basic rental with 25 percent of their income. 12 U.S.C. § 1715z-1(f)(2). The Secretary has implemented this program, and has estimated that it will require $29 million in contract authority to fund the program for fiscal year 1976 and the transition quarter.[6]

At issue here is another amendment contained in Section 212 of the 1974 Act. The amendment established the "operating subsidy" program and authorized the Secretary "to make and to contract to make" assistance payments to a Section 236 project owner, in addition to the interest-reduction payment, in an amount up to the amount by which the sum of the cost of utilities and local property taxes for the project exceeds the project's "initial operating expense level." These operating subsidies may be made to a Section 236 project owner only to the extent that there are tenants residing in the project who pay more than 30 percent of their income for rent,[7] and the maximum amount of the operating subsidy payment authorized is the amount necessary to reduce the rental charges of those tenants who

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[6] In the Budget Control Act of 1976, P.L. 93-344, 88 Stat. 297, Congress provided for a change in the beginning of the fiscal year from July 1, to October 1. *Id.* at section 501, 88 Stat. 321. This change is to be effective this year, 1976. Thus, fiscal 1976 ended on June 30, 1976, but fiscal year 1977 did not begin until October 1, 1976. The quarter year beginning July 1, 1976 and ending September 30, 1976 is termed the "transition Quarter."

[7] This limitation is set at 25% if the tenants pay their own utility costs.

pay more than 30 percent of their gross income. Finally, no payment may be made unless the Secretary determines that the increased costs are reasonable and comparable to cost increases affecting other rental projects in the community. 12 U.S.C. § 1715z-1(f)(3).[8]

The amendment further provided for establishment of an initial operating expense level for each project; for any project assisted under a contract entered into

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[8] 12 U.S.C. § 1715z-1(f)(3) provides:

> For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes is reasonable and is comparable to cost increases affecting other rental projects in the community.

prior to the date of the enactment of the Housing and Community Development Act of 1974, the Secretary was directed to establish the level not later than 180 days after the effective date of the Act. 12 U.S.C. § 1715z-1(g). Because Meyler Park was an existing project at the time of the enactment of the 1974 amendments, the initial operating expense level should have been established not later than February 18, 1975.

Congress also created a specific reserve fund for the Secretary's use in making "operating subsidy" payments. Prior to the 1974 amendments, a project owner was required to pay to the Secretary all rental charges collected in excess of basic rental charges. 12 U.S.C. § 1715z-1(g). These funds were deposited in a special revolving fund which could be utilized by the Secretary for the liquidation of contracts to make interest reduction payments subject to the limitation contained in any appropriation act. Under the 1974 amendment, the amount contained in the reserve fund could be used by the Secretary to make "operating subsidy" payments only.[9] The conditions under which the Secretary could spend the reserve

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[9] P.L. 94-378 (August 9, 1976), 90 Stat. 1095, changed the law by providing that after October 1, 1976, the reserve fund could be used to make contract payments for a number of other housing programs. However, we are not concerned here with the disposition of the reserve fund subsequent to the effective date of P.L. 94-378. For a discussion of this issue, *see Dubose* v. *Hills*, Civil Nos. H-75-303, 345, 346 (D. Conn., Sept. 27, 1976). The question of the manner in which the new law affects this litigation is discussed *infra*.

fund, as of February 18, 1975, constitutes the major aspect of the controversy before us now.

MOOTNESS

Initially, the Secretary argues that the controversy became moot on July 1, 1976. On that date, 89 of the 99 units of Meyler Park became recipients of a Section 8 assistance contract from HUD. 42 U.S.C. § 1437(f). Because no tenant may be required under Section 8 to pay more than 25% of his income for rent, those tenants so covered are no longer eligible for the "operating subsidy" program. The remaining ten units of Meyler Park were already covered by Section 23 [42 U.S.C. § 1241(b)], which applies the same 25% of income limitation. But the fact that the Meyler Park residents are not presently eligible for the "operating subsidy" program does not resolve the question of propriety of the District Court's Order of retroactive relief. That remains a live and important issue. *Powell* v. *McCormack*, 395 U.S. 486, 498 (1969); *Lidie* v. *State of California*, 478 F.2d 552, 554 (9th Cir. 1973). The resolution of the question necessitates the most careful study and comprehends all issues surrounding the "operating subsidy" program that have been properly raised.

ANALYSIS

I

The Secretary contends that she is vested with complete discretion in determining whether to implement

the "operating subsidy" program. This contention, based primarily on the language of the statute and congressional action since the statute's enactment, has been flatly and unequivocally rejected by every court that has considered the question. *Carberry* v. *Hills*, —— F.Supp. ——, Civil No. 76-251-F (D. Mass., March 8, 1976); *Campbell* v. *Hills*, Civil No. 75-471 (N.D. Ohio, Dec. 22, 1975); *Dubose* v. *Hills*, 405 F. Supp. 1277 (D. Conn. 1975); *Folsom Gardens Action Comm.* v. *Hills*, Civil No. S-76-43 (E.D. Cal., Feb. 12, 1976); *Gertsch* v. *Hills*, —— F. Supp. ——, Civil No. 75-513 (D. Utah, March 5, 1976); *Harrison* v. *Hills*, —— F. Supp. ——, Civil No. 75-938 (W.D. Pa., Oct. 1, 1975); *Ross* v. *Community Services, Inc.*, 405 F. Supp. 831 (D. Md. 1975), *aff'd*, —— F.2d —— (4th Cir. 1976). It is true that the language of Section f(3) is couched in precatory terms ("the Secretary *is authorized* to make and contract to make, additional assistance payments . . .,") (emphasis added), whereas the "deep subsidy" language of Section f(2) is mandatory ("the Secretary *shall make*, and contract to make additional assistance payments . . .") (emphasis added). However, from our review of the legislative history of the amendments, we conclude that the difference in language does not indicate that the Congress meant to give the Secretary unfettered discretion in respect to the payment of "operating subsidies." The difference may be more readily explained by the fact that "deep subsidy" payments are directed only toward projects initiated after the passage of the 1974 amendments, while the "operat-

ing subsidies" subsection is applicable to both new and *existing* projects. The following passage from the Senate Report explains the failure of the Congress to use mandatory language in drafting the "operating subsidies" amendment:

> While anxious to deal with [the problem of increased costs], the Committee also of course desired to develop a provision which would focus upon the real problem cases, and could be tightly administered, and would not simply reward poor management . . . .

S.R. No. 693, 93rd Cong., 2d Sess. (1974), reported in 3 U.S. Code Cong. & Admin, News 4303 (1974).

Thus, we agree with all of the other courts that the Congress did not intend to commit the award of "operating subsidies" to the complete discretion of the Secretary.

Neither do we find the Secretary's claim that Congress has approved her action any more persuasive than did the court in *Ross* v. *Community Services, Inc., supra.* The subsequent legislative action can at most be termed ambiguous, but a fair reading supports the view that Congress has specifically *disapproved* the Secretary's action.[10] Therefore, in light

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[10] On April 12, 1976, the Senate Committee on Banking, Housing and Urban Affairs, which authored the operating subsidy program and is the Senate committee charged with overseeing its implementation, stated:

> The reserve [fund] is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet im-

of the abundant and uniform decisions that the discretion of the Secretary in administering the "operating subsidy" program is narrowly limited, we see no useful purpose in further discussion of this issue. *See* particularly, *Dubose* v. *Hills, supra; Ross* v. *Community Services, supra; Ross* v. *Community Services, Inc.*, 396 F. Supp. 278 (D. Md. 1975); *Underwood* v. *Hills*, 414 F. Supp. 526 (D.C. 1976).

II

The Secretary further argues that her decision not to implement the "operating subsidy" program was a permissible exercise of discretion because implementation of the program would conflict with other statutory housing goals. The thrust of her argument is a familiar one, *i.e.*, that her resources are limited and she must therefore choose between full implementation of several worthwhile programs. She points to the decision in *Commonwealth of Pennsylvania* v. *Lynn*, 501 F.2d 848 (D.C. Cir. 1974), as controlling. However, *Lynn* is inapposite. To discuss this case is unnecessary because there is no conflict between the "operating subsidy" program and any other housing program.

As explained above, the usual method by which HUD obligates the Government is through "contract authority." The Secretary takes the position that she is unable to proceed with the "operating subsi-

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plemented this provision of the 1974 Act. S.R. No. 94-749, 94th Cong. 2d Sess. 10 (1976).

dies" program because she lacks the requisite contract authority.[11] She argues that since only $71 million[12] of unreserved contract authority remains, it is impossible for her to fund both the interest reduction program, estimated to cost $58.9 million, and the "operating subsidy" program, estimated to require $51.4 million.

We disagree with the Secretary's assumption that the reserve fund is subject to contract authority limitations. The text of the statute, as amended in 1974,[13]

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[11] The most obvious reason for holding that contract authority is not the only method by which the Secretary can carry out her programs, is found in the language of subsection (f) (3) wherein appears the phrase "make and contract to make." Congress obviously contemplated payments not under contract, else it would not have made such a superfluous distinction.

[12] The latest complete figures with which this court has been presented show $90.1 million of unreserved contract authority as of September 1975. The "deep subsidy" program, which is concededly mandatory, has been estimated by the Secretary to require $29 million. We do not accept the assertion of the Secretary in her reply brief that only $30.6 million of contract authority remains, because it is unclear whether the reduction is due to the funding of the interest reduction or "deep subsidy" programs.

[13] 12 U.S.C. § 1715z-(1) (g) provides:

> The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve

makes no reference whatsoever to contract authority. Rather, it provides that the sums are "to be used" by the Secretary to make "operating subsidies." Thus, in our view, the reserve fund, which contained $40 million at the time the present suit was instituted,[14] and which was then required to be spent only on "operating subsidies," [15] was immediately available for the Secretary's use. We hold that it was an abuse of discretion for the Secretary arbitrarily to refuse to apply these funds for their prescribed use. The legislative history is consistent with the position we

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fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

[14] The Secretary contends that the reserve fund lawfully contained only $22 million because of $18 million erroneously collected. The amount of the fund is not here material, inasmuch as there certainly remains a sufficient sum to grant the relief requested by the plaintiffs.

[15] Congress changed the requirement that the reserve fund be used only for "operating subsidies" in P.L. 94-378, 90 Stat. 1095 (August 9, 1976). The provision, enacted after the institution of the present suit, allows the reserve fund to be used for a number of housing programs.

have taken.[16] For a further analysis of this issue, *see Dubose* v. *Hills*, *supra*, at 1285-86.

The Secretary next contends that even if the reserve fund were available, the third sentence of 12 U.S.C. § 1715z-(1)(g) required that she make a determination, prior to making any "operating subsidy" payments, that the balance in the reserve fund was adequate. Accordingly, because she found the fund inadequate, she did not make payments to Meyler Park. Since we hold that a determination of adequacy is not a prerequisite to use of the fund for "*operating subsidies*," we do not reach the question of sufficiency of monies in the fund. Our decision that a finding of adequacy is not required by the pertinent law is based on the text of the statute itself. We find little assistance in the legislative history.

The third sentence of Subsection (g) reads as follows:

> During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect

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[16] *See* S.R. No. 93-693, 93d Cong., 2d Sess. (1974); H. Conf. R. No. 93-1279, 93d Cong., 2d Sess. (1974). Both are reported in 3 U.S. Code Cong. & Admin. News 4273, 4302-04, 4375 (1974).

> to rental housing projects receiving assistance under this section. 12 U.S.C. § 1715z-(1)(g).

If we were to accept the Secretary's interpretation of the quoted provision, we would be required to hold that Congress employed the phrases "additional assistance payments" and "assistance payments with respect to rental housing projects receiving assistance under this section," synonymously. Aside from the fact that such an interpretation would ascribe to the draftsmen a very cumbersome use of language, we see a definite congressional intention to give distinctly different meanings to "assistance payments" and "*additional* assistance payments" in 12 U.S.C. § 1715z-(1). (Emphasis supplied.) The former refers to interest reduction payments, while the latter refers to "deep" and "operating subsidies." [17] Therefore, under the language of Subsection (g), there is a significant difference between the two terms as they are used in the quoted sentence. Under our interpretation, the reserve fund is immediately available for use in implementing the "operating subsidy" program, and only if the Secretary determines that the fund is adequate to meet that program's needs, may she *thereafter* credit excess charges to the appropriation authorized in Subsection (i).[18]

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[17] *Compare* 12 U.S.C. § 1715z-(1)(b), (i)2, (i)3 with 12 U.S.C. § 1715z-(1)(f)2, (f)3.

[18] The present effect of subsection (g) is left substantially in doubt by the passage of P.L. No. 94-378, 90 Stat. 1095 (August 9, 1976). Our discussion is based on the statute as it existed at the time when the District Court was obliged to reach its decision.

III

We now turn to the Secretary's contention that any claim for retroactive relief is necessarily barred by the doctrine of sovereign immunity. We have concluded that sovereign immunity has been fully waived by Congress in 17 U.S.C. § 1702 (1934). The Supreme Court in *Federal Housing Administration, Region 4* v. *Burr*, 309 U.S. 242 (1940), stated that the words "sue and be sued in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings . . .," and concluded that the FHA (now HUD) was subject to garnishment. The Court went beyond *Burr* in *R.F.C.* v. *Menihan Corporation*, 312 U.S. 81, 84 (1940) in stating, "We apply the further principle that the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings. . . ." [19] Additionally, we have ourselves held in *State of Washington* v. *Udall*, 417 F.2d 1310 (9th Cir. 1969), that a suit against a government officer in his official capacity was not a suit against the sovereign if the officer's powers were limited by statute and his actions were *ultra vires*. *See also Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). We further stated that certain kinds of affirmative relief may be barred if such relief would work an intolerable burden on government functions, outweighing any consideration of

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[19] *Menihan* held that an award of costs would not be barred by sovereign immunity.

private harm. That we did not mean always to preclude actions for damages is made clear by a following sentence: "In such cases a party must be denied all judicial relief other than that available in a possible action for damages. . . ." [20] *Id.* at 1318. The present case falls squarely within the *ultra vires* exception to sovereign immunity, and *State of Washington* v. *Udall, supra,* authorizes the relief granted by the District Court, whether such relief is described as "damages" or "equitable restitution."

While we have concluded that the District Court had the *power* to order retroactive relief, we must consider the propriety of its action. The language of subsection (g) doubtless mandated the establishment of an initial operating expense level for Meyler Park not later than February 18, 1975, but subsection (f)(3) appears to give the Secretary broad discretion as to the timing of payments. It provides that "[a]t any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments. . . ." However, we noted in an earlier portion of this opinion our reasons for concluding that the precatory language of subsection (f)(3) was not conclusive. We therefore hold that Congress intended for the Secretary to aid *some* projects by February 18, 1975.

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[20] We think that the opinion of the Supreme Court in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), clearly indicates that the retroactive relief sought must be treated as the functional equivalent of a suit for damages.

Upon making this determination, we would ordinarily remand a matter such as this to the District Court with instructions that the Secretary be ordered to determine whether Meyler Park qualified for an operating subsidy during the period in question. But this two-step procedure was followed in *Ross* v. *Community Services, Inc.*, 396 F. Supp. 278 (D. Md. 1975), and upon remand the Secretary adamantly refused to pay the plaintiff's a subsidy, adhering to her view that the statute gave her absolute unfettered discretion to decide whether to award an operating subsidy to a particular project. The district judge in *Ross* held that the Secretary had abused her discretion by refusing to grant the subsidy and awarded relief. In order to avoid a similar delay in this case, we choose now to affirm the District Court's Order in its every aspect. Considering the circumstances of the respective parties, the fact that the program should have been implemented long ago, and the fact that the record discloses no reason why the appellees should not qualify under the statute, it would constitute an abuse of discretion for the Secretary not to grant an operating subsidy that has been ordered.

P.L. 94-378

One final matter requiring our attention is the Secretary's claim that the passage of P.L. 94-378, 90 Stat. 1095, 1096 (August 9, 1976) prohibits the result we have reached. The Act appropriates a fixed sum of money for various purposes (including the

"operating subsidy" program) and contains the following proviso:

> *Provided*, That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act [12 U.S.C. 1715z-1 (g)], as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.

The Secretary argues that the above language makes it clear that contract authority is required before any of the money in the reserve fund may be utilized. We can answer this argument no better than did the court in *Dubose* v. *Hills*, Civil Nos. H-75-303, H-75-345, H-75-346 (D. Conn., Sept. 27, 1976):

> The premise of this argument is that the reserve fund can be spent only pursuant to contract. In my earlier consideration of this issue, I reviewed the statutory language and the legislative history and concluded that "direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the Secretary's available contract authority." However, the defendants now argue that the proviso of Public Law 94-378, which states that the reserve fund shall be available "for the payments on contracts entered into pursuant to the authorities enumerated above," supports their position that the reserve fund can only be spent pursuant to contract authority.
>
> The defendants place too much weight upon the proviso's reference to contracts. The language merely recognizes that many of the pro-

> grams enumerated in Public Law 94-378, including interest reduction payments under the Section 236 program, do require the obligation of contract authority prior to the expenditure of appropriations. However, I conclude that the proviso does not indicate that the reserve fund can *only* be spent pursuant to contract. (Slip op. at 6, 7.)

Our holding on this issue is thoroughly fortified by the Conference Report explaining the Committee's action in restoring the proviso (after it had been struck by the Senate):

> Amendment No. 3: Restores language proposed by the House and stricken by the Senate making available any excess rental charges under Section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account.
>
> *The committee of conference is agreed that this action shall not prejudice any suit now or hereafter before the courts in this area.* (Emphasis added).

H. R. Report No. 94-1362, 94th Cong., 2d Sess. (1976). It therefore quite clearly appears that Congress did not intend that P.L. 94-378 should forestall such relief as was here ordered by the District Court.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2095
DC# CV 75-3009 JWC

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, Individually and as representatives of a class, APPELLEES,

v.

CARLA A. HILLS, Secretary of the United States Department of Housing and Urban Development, et al., APPELLANTS

JUDGMENT

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 1, 1976.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-3009-JWC

[Filed May 6, 1976, Clerk, U. S. District Court, Central District of California]

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, individually, and as representative of a class,
PLAINTIFFS

v.

CARLA HILLS, as Secretary of the United States Department of Housing and Urban Development,
ET AL., DEFENDANTS

MEMORANDUM OPINION

Plaintiffs, individually and on behalf of all others similarly situated, seek to compel the Secretary of Housing and Urban Development and certain officials thereof (hereinafter HUD) to implement the operating subsidy provisions of Section 236 (f)(3) and (g) of the National Housing Act, as amended by the Housing and Community Development Act of 1974, 12 U.S.C. § 1715z-1(f)(3) and (g).

Jurisdiction is invoked pursuant to 28 U.S.C. § 1361. *See, e.g., Elliott* v. *Weinberger*, No. 74-1611, (9th Cir. October 1, 1975). On December 19, 1975, this court entered Findings of Fact, Conclusions of

Law and an Order granting the plaintiffs' motion for summary judgment.

The relevant portions of the Housing Act require that HUD "shall" establish an initial operating expense level comprised of utility and property tax expenses incurred by the owner of a federally subsidized housing project. HUD is then "authorized" to pay the housing project owner an operating subsidy for utility and property tax expenses which exceed the initial operating expense level.[1] Additionally, the Housing Act creates a reserve fund to be used by HUD to make the above operating subsidy payments.[2]

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[1] 12 U.S.C. § 1715z-1(f)(3) provides in pertinent part:

"For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account and anticipated customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, . . ."

[2] 12 U.S.C. § 1715z-1(g) provides in pertinent part:

"The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section."

If the housing project owner is not paid this operating subsidy, the housing project owner will, of course, pass the utility and property tax expenses onto the tenants in the form of rent increases. Thus, economically speaking, the housing project owners are rather ambivalent towards the operating subsidy.

The facts of this case are not in dispute. Plaintiffs are all tenants of Meyler Park Apartments, a federally subsidized housing project designed for lower income families. On August 7, 1974, and on July 3, 1975, the owner of Meyler Park Apartments applied to HUD for rental increases which were, in part, necessitated by increased utility and property tax expenses incurred by that owner. Both of the rent increase requests were substantially approved and subsequent requests for operating subsidy payments were made to HUD. However, HUD had neither established an initial operating expense level for the Meyler Park housing project nor would it make any operating subsidy payments to that housing project's owner. Plaintiffs then brought this suit and prevailed on their motion for summary judgment.

The thrust of HUD's arguments on motion for rehearing, which are essentially the same arguments as those made in opposition to plaintiffs' motion for summary judgment, is twofold: (1) that HUD is vested with discretion to implement the operating subsidy and (2) that contract authority must be utilized in order that the reserve fund be used to make operating subsidy payments.

In support of its argument that the implementation of the operating subsidy is totally discretionary, HUD contends that by the express language of 12 U.S.C. § 1715z-1(f)(3) HUD is merely "authorized" to make the operating subsidy payments, and thus there is no duty to do so.

After reviewing the legislative history, the Congressional intent and the express statutory language, every court that has considered this argument has expressly rejected it, and this court likewise rejects it. *See Ross* v. *Community Services, Inc.*, 396 F. Supp. 278 (D. Md. 1975); *Harrison* v. *Hills*, No. 75-938 (W.D. Penn. October 1, 1975); *Dubose* v. *Hills*, No. 75-303 (D. Conn. December 15, 1975); *Parker Square Tenants* v. *Department of Housing and Urban Development*, No. 75-577 (W.D. Mo. January 27, 1976).

HUD's second argument in support of its position that the implementation of the operating subsidy is not mandatory is that HUD has discretion on how to allocate released contract authority among the various federal housing programs and thus is empowered to choose not to expend any released contract authority for the operating subsidy.

Congress has authorized HUD to use contract authority released prior to the enactment of the Housing and Development Act of 1974,[3] and it is undis-

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[3] In Sen. R. No. 93-1255, 93rd Cong., 2nd Sess. 8 (1974), accompanying the supplemental appropriation Act, Pub. L. 93-554, the Senate Appropriations Committee stated in Pertinent part:

[Footnote continued on page 28a]

puted that such contract authority exists. HUD merely refused to use that released contract authority.

In view of the mandatory nature of 12 U.S.C. § 1715z-1(f)(3) and the clear unequivocal intent of the Senate Appropriations Committee,[4] this refusal has previously been held, and is presently held by this court, to be an abuse of discretion. *See Dubose* v. *Hills, supra; Parker Square Tenants* v. *Department of Housing and Urban Development, supra.*

Finally, HUD argues that the reserve fund established by 12 U.S.C. § 1715z-1(g) cannot be used to make operating subsidy payments without expending contract authority. I find this argument to be without merit.

The express language of 12 U.S.C. § 1715z-1(g) creates a totally independent source of funds from which the operating subsidy is to be paid. Thus, the reserve fund is not subject to the restrictions applicable to other appropriation subsections contained in 12 U.S.C. § 1715z-1. *See Ross* v. *Community Services, Inc., supra.*

Even assuming that the existing contract authority must be utilized in order to make the operating

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[3] [Continued]

"The Committee wishes to clarify the intent in the joint explanatory statement of the Committee of Conference on H.R. 15572 with respect to the use of operating cost subsidies for Section 236 projects that the Secretary is authorized to use available contract authority for operating subsidies for existing or new Section 236 projects."

[4] Id.

subsidy payments from the reserve fund, HUD's refusal to use the existing contract authority is an abuse of discretion. *See Dubose* v. *Hills, supra; Parker Square Tenants* v. *Department of Housing and Urban Development, supra.*

I conclude, therefore, that HUD has a ministeral duty to implement the operating subsidy and that HUD's refusal to utilize existing contract authority to do so is an abuse of discretion. Accordingly, HUD's motion for a rehearing is denied.

DATED: May 6, 1976.

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

APPENDIX D

STATUTORY PROVISIONS

12 U.S.C. 1715z-1 provides in pertinent part:

(a) *Authorization for periodic interest reduction payments on behalf of owner of rental housing projects.*

For the purpose of reducing rentals for lower income families, the Secretary is authorized to make, and to contract to make, periodic interest reduction payments on behalf of the owner of a rental housing project designed for occupancy by lower income families, which shall be accomplished through payments to mortgagees holding mortgages meeting the special requirements specified in this section.

(b) *Restrictions on payments; payments with respect to projects financed under State or local programs; mortgage insurance premium.*

Interest reduction payments with respect to a project shall only be made during such time as the project is operated as a rental housing project and is subject to a mortgage which meets the requirements of, and is insured under, subsection (j) of this section: *Provided,* That the Secretary is authorized to continue making such interest reduction payments where the mortgage has been assigned to the Secretary: *Provided, further,* That interest reduction payments may be made with respect to a mortgage or part thereof on a rental or cooperative housing project owned by a private nonprofit corporation or other pri-

vate nonprofit entity, a limited dividend corporation or other limited dividend entity, or a cooperative housing corporation, which is financed under a State or local program providing assistance through loans, loan insurance, or tax abatements, and which may involve either new or existing construction and which is approved for receiving the benefits of this section. The term "mortgage insurance premium", when used in this section in relation to a project financed by a loan under a State or local program, means such fees and charges, approved by the Secretary, as are payable by the mortgagor to the State or local agency mortgagee to meet reserve requirements and administrative expenses of such agency.

(c) *Amount of payments.*

The interest reduction payments to a mortgagee by the Secretary on behalf of a project owner shall be in an amount not exceeding the difference between the monthly payment for principal, interest, and mortgage insurance premium which the project owner as a mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest such project owner would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

12 U.S.C. (Supp. V) 1715z-1(f)(3) provides:

(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at

the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

12 U.S.C. (Supp. V) 1715z-1(g) provides:

The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph

(3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

42 U.S.C. 1441 provides:

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. * * *

42 U.S.C. 1441a provides:

> The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, of the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family". The Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families.

Pub. L. 94-378 provides in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes, namely:
>
> * * * * *
>
> For the payment of annual contributions, not otherwise provided for, in accordance with section 5 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437c); for payments authorized by title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749 et seq.); for rent supplement payments authorized by section 101 of the

Housing and Urban Development Act of 1965, as amended (12 U.S.C. 1701s); for payments as authorized by sections 235 and 236, of the National Housing Act, as amended (12 U.S.C. 1715z, 1715z-1); and for payments as authorized by section 802 of the Housing and Community Development Act of 1974 (88 Stat. 633), $2,975,000,000; *Provided*, That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act, as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.

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No. 76-1261

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

vs.

HILDA ABRAMS, ET AL., RESPONDENTS

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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This Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is filed on behalf of Hilda Abrams and the class she represents.

OPINIONS BELOW

The opinion of the Court of Appeals is now reported at 547 F.2d 1062 (9th Cir. 1976).

STATEMENT

Meyler Park Apartments is a 100 unit Section 236[1] federally subsidized project designed to house Respondents who are all elderly lower-income tenants. Between November 1974 and September 1975 rents approved by Petitioners, Secretary of the United States Department of Housing and Urban Development (HUD) and other HUD officials, for Meyler Park Apartments increased 21.2% [R. 448-449] causing Respondents to pay upwards to 46% [R. 106] of their fixed incomes for rent. These rent increases were attributed in part to increases in property taxes and utility costs. [Pl. Ex. H, J and R; R. 44, 47 and 152].

Congress in August 1974 enacted the Section 236 operating subsidy provision.[2] Operating subsidies are designed to benefit both tenants and owners of Section 236 housing projects by making money available to offset escalating costs of property taxes and utilities so that projects can remain viable while rents remain at affordable levels. Both Respondents and the owners and managers of Meyler Park Apartments applied for the benefits of the operating subsidy program. [Pl. Ex. O and R; R. 64-65 and 152]. Petitioners failed to reply to either of these requests. Thus, Respondents filed a complaint seeking to enjoin the rent increase imposed by the owners and managers of Meyler Park Apartments and to mandate Petitioners to make available the operating subsidy payments retroactive to February 18, 1975. [R. 1]. The District Court entered a summary judgment in favor of Respondents.

On July 1, 1976, while appealing the lower court decision, Petitioners made available Section 8[3] benefits to Respond-

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1. Section 236 of the National Housing Act, as enacted in 1968, is "[f]or the purpose of reducing rentals for lower income families." 12 U.S.C. § 1715z-1(a).

2. 12 U.S.C. (Supp. V) § 1715z-1(f)(3) and (g).

3. 42 U.S.C. (Supp. V) § 1437f.

ents and the owners and managers of Meyler Park Apartments which reduced Respondents' rents to 25% of their family income. Because tenants who pay no more than 25% of their income for rent are ineligible to receive the benefits of the operating subsidy program, Petitioners argued to the Ninth Circuit that Respondents' claims were prospectively moot. The Ninth Circuit considered the Respondents' retroactive claim for payments from February 18, 1975 to July 1, 1976 a live and important issue and hence affirmed "the District Court's Order in its every aspect."[4]

Petitioners in the Statement of the case seriously misstate the facts when they assert that release of the money in the reserve fund for payment of operating subsidies requires the use of contract authority.[5] [*Abrams* Pet. 3-5]. This assertion is in reality merely a legal argument which has been rejected by the Ninth Circuit[6] and every court that has considered the issue.[7] The courts have found and

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4. *Abrams v. Hills*, 547 F.2d 1062, 1067, 1071 (9th Cir. 1976).

5. Contract authority is the power conferred upon the government by statute to enter into contracts up to a stated amount with the obligation to pay money immediately and in the future. Appropriations Acts provide for the liquidation of such commitments as they become due. *Abrams v. Hills*, 547 F.2d at 1065. *See also, Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975).

6. *Abrams v. Hills*, 547 F.2d at 1069.

7. *Abrams v. Hills*, 415 F. Supp. 550 (C.D.Ca. 1976); *Battles Farm Co. v. Hills*, 414 F. Supp. 521 (D.D.C. 1976); *Campbell v. U.S. Dept. of Housing and Urban Dev.*, C.A. No. C 75-471 (N.D. Ohio, December 2, 1975); *Carberry v. Hills*, C.A. No. 76-521-F (D.Mass., March 8, 1976); *Dubose v. Hills*, 405 F. Supp. 1277 (D.Conn. 1976); *Folsom Gardens Action Committee v. Hills*, C.A. No. S-76-43 TJM (E.D.Ca., February , 1976); *Gertsch v. Hills*, 414 F. Supp. 15 (D.Utah 1976); *Harrison v. Hills*, C.A. No. 75-938 (W.D.Pa., October 1, 1975); *Lefort v. Hills*, C.A. No. 76-0286 (D. RI, November 19, 1976); *Parker Square Tenants Ass'n v. U.S. Dept. of Housing and Urban Dev.*, C.A. No. 75 CV 577-W-3 (January 27, 1976); *Ross v. Community Services, Inc.*, 405 F. Supp. 831 (D.Md. 1975), *aff'd*, 544 F.2d 514 (4th Cir. 1976); *Sicuro v. Hills*, 415 F. Supp. 553 (C.D.Ca. 1976); *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976).

the statute is clear that the reserve fund which is the primary source of cash available to make operating subsidy payments is composed of money collected independently of congressional appropriations. Thus, Petitioners' description of the usual process whereby the Secretary of HUD expends funds through the release and use of contract authority is simply irrelevant to how the reserve fund can be expended.

Petitioners admit that there is at least $54.4 million in the reserve fund and that prior to August 1976 this fund could be used only for the payment of operating subsidies. [*Abrams* Pet. 3 n.2]. Thus, by admission of Petitioners, there is a clear congressional directive and sufficient money[8] to make operating subsidy payments to Respondents for the period of time at issue, February 18, 1975 to July 1, 1976.

REASONS FOR DENYING THE PETITION

There is no split among the Circuit Courts. Both the Fourth Circuit and the Ninth Circuit ruled in favor of Respondents' position. The court below correctly decided the issues involved in this case.

A. There Is No Conflict Between the Circuits or Among the District Courts

Petitioners noted that "the question presented here has arisen in at least 30 cases,[9] has been litigated in two courts of appeals and is presently before two other courts of

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8. Respondents and Petitioners can not agree upon the precise amount of money that Respondents should be paid. However, figures filed by Respondents in the District Court, upon remand, submit that the maximum subsidy per tenants is under $14.00 per unit per month. Petitioners' figures are substantially lower.

9. Petitioners in response to the request of the Ninth Circuit submitted a list of pending operating subsidy suits. There were 40 cases listed as of October 7, 1976.

appeals." [*Ross* Pet. 6-7]. Significantly, however, Petitioners failed to mention that every court that has rendered a decision on the merits of Petitioners' claims has rejected their position and has ruled in favor of the tenants, finding the statute mandatory and ordering payment of operating subsidies. Both the Fourth Circuit[10] and the Ninth Circuit[11] have without dissent affirmed the lower court decisions. Thirteen district courts have also independently reviewed the issues and found that the operating subsidy program must be implemented.[12]

The decisions of all these courts were well reasoned and fully supported by a plain reading of the statute, legislative intent[13] and case law. Ample opportunity was provided to each court to reevaluate its position through motions for rehearings, summary judgments and requests for dissolution of preliminary injunctions filed by the Petitioners.[14] On the merits, none of these courts has reversed its initial findings.

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10. *Ross v. Community Services, Inc.*, 544 F.2d 514.

11. *Abrams v. Hills*, 547 F.2d 1062.

12. *See*, footnote 7, *supra*.

13. S.Rep. No. 693, 93d Cong., 2d Sess. 32 (1974), *reprinted in* (1974) U.S. Code Cong. & Ad. News 4303-4; H.R.Rep. No. 1114, 93d Cong., 2d Sess. 21 (1974); H.R.Conf.Rep. No. 1279, 93d Cong., 2d Sess. (1974), *reprinted in* (1974) U.S. Code Cong. & Ad. News 4475; S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974); S.Rep. No. 326, 94th Cong., 1st Sess. (1975); S.Rep. No. 749, 94th Cong., 2d Sess. 10 (1976), *reprinted in* (1976) U.S. Code Cong. & Ad. News 1894.

14. *Abrams v. Hills*, 415 F. Supp. at 552; *Dubose v. Hills*, 420 F. Supp. 399 (D.Conn. 1976), Ruling on Motion to Vacate Order and Dissolve Preliminary Injunction; *Gertsch v. Hill* [sic], No. C75-513 (D.Ut., March 3, 1977) Order Denying Defendants Motion to Dismiss or, In the Alternative, To Stay Further Proceedings and To Vacate Order and To Dissolve Injunction; *Ross v. Community Services, Inc.*, No. H-75-506 (D.Md., December 31, 1975) order granting plaintiffs motion for summary judgment and denying defendants cross-motion, *Ross* Pet. App. D, 30a; Order denying federal defendants motion to reconsider and motion for a stay (1976).

B. The Issues Were Correctly Decided Below

Ordinarily Respondents would not argue the merits of the case in a Brief in Opposition to a Writ of Certiorari. However, Petitioners in support of their petition for *certiorari* have placed substantial reliance upon the arguments that: the Secretary has absolute discretion not to implement the operating subsidy program and that she has not abused that discretion. Both of these arguments on the merits have been rejected by the courts below.[15]

The Secretary's argument that the operating subsidy provision is permissive is based exclusively on *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C.Cir. 1974). The Secretary's reliance, however, is misplaced. The *Lynn* court held that:

> the Secretary has the discretion, . . . indeed the obligation to suspend [a] programs' operation when he has adequate reason to believe that [the programs] are not serving Congress's purpose of aiding specific groups in specific ways, or are frustrating the national housing policies applicable to all housing programs.
> 501 F.2d at 855-856.

The case is inapplicable to the present situation where in contrast, the Secretary is claiming discretion not to implement the operating subsidy program because of her preference for other programs and the alleged administrative inefficiency of the operating subsidy program. In fact, the *Lynn* court itself distinguished the two situations noting that:

> it may be doubted whether mere "concern about the equity and efficiency" of a program duly established by Congress could, without more, support an executive decision to suspend its operation, ...
> 501 F.2d at 852.

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15. *See*, footnotes 6 and 7.

The Ninth Circuit concurred in this reasoning by finding *Lynn* inapposite.[16]

In support of her position that she did not abuse her discretion, the Secretary argues that there is insufficient contract authority available to cover her obligations under the Section 236 interest reduction subsidy, the deep subsidy and operating subsidy programs and that she therefore had the discretion to choose among programs. Assuming *arguendo* that there were not sufficient funds for all three programs, and that the Secretary could choose to implement one program over the others, the Secretary's argument fails because contract authority is not required to release the reserve funds. As noted previously in Respondents' Statement, all the courts have held that the availability of contract authority is immaterial to the release of money from the reserve fund. *See*, pp. 3-4, *supra*. The passage of Pub.L. 94-378, 90 Stat. 1095, does not alter this conclusion.[17] The fact that the new law permits the Secretary to use the reserve fund to liquidate contracts does not implicitly require the use of contract authority to make operating subsidy payments. The reserve fund is still independent of appropriations and immediately available to make operating subsidy payments.

By finding that contract authority is not necessary to the release of the reserve fund, the courts have destroyed Petitioners' stance that implementation of operating subsidies would conflict with other housing programs. The full amount of the contract authority remains available to im-

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16. *Abrams v. Hills*, 547 F.2d at 1068.

17. *See, Abrams v. Hills*, 547 F.2d at 1071 citing *Dubose v. Hills*, 420 F. Supp. at 401-402 which rejected the Secretary's argument on Pub.L. 94-378. *See also, Ross v. Community Services*, 544 F.2d at 514 affirming after the passage of Pub.L. 94-378 the lower court decision which mandated operating subsidies.

plement the interest reduction and deep subsidy programs while the reserve funds are automatically released to make operating subsidy payments. Both obligations can be met without jeopardizing any programs.

Excessive administrative costs are cited for the first time in this appeal to justify the Secretary's assertion that she did not abuse her discretion by deciding not to implement the operating subsidy program.[18] This claim must be rejected because the burden claimed by Petitioners is not substantially different than the burden that they are required to meet in administering similar housing programs.[19]

The final argument posited by Petitioners to support their conclusion that the Secretary did not abuse her discretion in refusing to implement the operating subsidy program is that the reserve fund is insufficient to meet the projected needs. This argument is both factually and legally unsupportable. Within the facts of this case, the

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18. Petitioners self-serving affidavits should be given no weight since it is the first time such affidavits have been presented for consideration. *See, Abrams* Pet. 4 n.3. To do so would deprive Respondents of their due process rights to test the assertions in the affidavits.

19. *See e.g.,* rent supplement program 12 U.S.C. § 1701s: tenants pay twenty-five percent of adjusted income for rent. 12 U.S.C. § 1701s(d). The Secretary must at least biennially certify that the tenants are "qualified" to receive the benefits. 12 U.S.C. § 1701s (e)(1). Section 8 program 42 U.S.C. § 1437f: tenants pay fifteen to twenty-five percent of adjusted income for rent. 42 U.S.C. § 1437f(c)(3). The maximum or fair market rent for an area is established by the Secretary at least annually, 42 U.S.C. § 1437 (c)(1), and rent adjustment may be made on an area or individual basis. 42 U.S.C. § 1437(c)(2). Deep subsidy program 12 U.S.C. § 1715z-1(f)(2); twenty percent of the tenants in a new Section 236 project pay twenty-five percent of their adjusted income for rent including utilities. Changes in the percentage of tenants to be housed in a particular project and the rent-income ratio may be made by the Secretary.

reserve fund which is currently estimated by Petitioners to contain $54.4 million is certainly adequate to pay to each Respondent approximately $14.00 per month for the limited period of February 18, 1975 to July 1, 1976.[20] Courts that have considered the broader impact of the case have also found the fund adequate.[21] Even Petitioners admit that there is more than enough money in the reserve fund to implement the program for one year.[22] Other courts have found that even assuming *arguendo* that the fund is inadequate, it is the Secretary's duty—the function of the administrative branch—to "create reasonable classifications and eligibility requirements in order to allocate the limited funds available to [her] for this purpose."[23]

CONCLUSION

For the foregoing reasons, we submit that the decisions of the Ninth Circuit and the District Court were well reasoned and supported by case law and by concurrent as well as subsequent legislative history. There is no conflict among the lower court decisions. Thus, we respectfully

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20. *Abrams v. Hills*, 547 F.2d at 1069 n. 14, which found that "[t]he amount in the reserve fund is not here material, inasmuch as there certainly remains a sufficient sum to grant the relief requested by the plaintiffs."

21. *Parker Square Tenants Ass'n v. U.S. Dept. of Housing and Urban Dev.*, C.A. No. 75 CV 577-W-3, Slip Op. 18. *See also, Underwood v. Hills*, 414 F. Supp. at 532 in which the D.C. District Court ordered operating subsidy payments to be made for a nationwide class "as the availability of funds permits."

22. *See, Abrams* Pet. 4 where Respondents allege that the implementation of the operating subsidy program would cost $53.7 million for fiscal year 1976 and that as of December 31, 1976 the reserve fund contained approximately $54.4 million.

23. *Ross v. Community Services, Inc.*, 405 F. Supp. at 836 *quoting Morton v. Ruiz*, 415 U.S. 199, 230 (1974).

submit the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 1977.
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